In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 31, ORIGINAL

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

REPLY BRIEF FOR THE UNITED STATES

The position of the United States in this case rests on two simple propositions: (1) The doctrine of reliction applies to the Great Salt Lake as to all other navigable bodies of water; and (2) the water movements on the Great Salt Lake have been gradual and imperceptible so that under the doctrine of reliction the boundary of the United States as riparian owner has followed the advance and retreat of the water's edge.

In our original brief we indicated how, in our view, the Special Master erred in rejecting the first proposition based on the frequency and rapidity of temporary and seasonal movements on the Lake and in rejecting the second based on his consideration of temporary fluctuations rather than only the movement of the "average yearly stage" of the Lake.

In this reply brief we focus on three points: (1) Utah's mischaracterization of the government's theory of the Lake boundary as a "shooting boundary"; (2) that the errors we find in the Special Master's Report are errors of law and not of fact; and (3) various technical and computational disputes raised by the Utah brief.

1. The United States is relying in this case on the common law principle that seasonal or temporary changes in a riparian boundary do not change the legal boundary. *Alabama* v. *Georgia*, 23 How. 505, 515; *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 625-626. Thus, the succession of high and low tides and the monthly and annual variations in those tides do not constitute a change in an ocean boundary. *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 26-27. Rather, the boundary is established by an averaging of observations over an 18.6 year period, corresponding to a complete cycle of the astronomical phenomena affecting tidal action. *Ibid.* In just the same way, the United States contends, the daily and seasonal variations in the level of the Great Salt Lake do not affect the legal boundary. We contend that these factors may be accounted for in much the same way as in the tidal situation, by taking an average of observations over an annual period. Utah mischaracterizes this contention as creating a "shooting" boundary, which remains fixed except that once each year it "shoots" to the new level.

The United States does not urge such a position, any more than it regards a tidal boundary as remaining fixed for a period of 18.6 years and then "shooting" to a new level based on the levels of a recently completed cycle. Rather, just as in the tidal rule, the legal level at any particular date is the "average yearly stage" (Br. 11; Report 14-15), found by averaging periodic readings over the preceding full period, in this case one year. Utah may have been misled by the circumstance that, in charting the history of the Lake, both sides have generally spoken of a yearly level composed of readings taken over the course of a specified calendar year. Thus, the average of readings taken over the year 1973 would be the legal level for January 1, 1974. If the Lake were

generally to rise during 1974 (although that movement would, of course, fluctuate with daily variations and with the seasonal rise and fall), then the 1974 average (the legal level for January 1, 1975) would be higher. But the level would not instantaneously "shoot" to the higher level on January 1, 1975. It would, instead, rise gradually during the year, each time a new (presumably higher) reading was included in the average and a corresponding older (presumably lower) reading for the previous year was dropped. This again would be exactly analogous to the method of tidal computation.

Thus the method for computing the legal boundary of the Great Salt Lake is fully in accord with precedent, and is a workable method of measuring. It concededly could cause administrative problems not present with an absolutely fixed boundary, and that possibility was, of course, one of the reasons for the passage of the Great Salt Lake Lands Act. But mere administrative difficulties do not abrogate the common law rules of reliction. *United States* v. *Louisiana*, 394 U.S. 1, 5-6.

2. Utah relies heavily on the argument that the Report of the Special Master consists of findings of fact which must be upheld by this Court unless "clearly erroneous," as in the standard established by Rule 52(a), Fed. R. Civ. P. While we disagree that factual findings by a Master appointed by this Court are entitled to such weight (see *Mississippi* v. *Arkansas*, 415 U.S. 289, 291, 292; 296-297, Douglas, J., dissenting), that question has no real relevance here. The essential facts of the characteristics and movement of the Lake are not in dispute, as Utah itself concedes (Utah Br. 8). The dispute arises over the legal significance of these facts, under the common law doctrine of reliction.

An examination of the United States' exceptions to the Master's findings of fact reinforces this conclusion. Exceptions 1 and 2 are essentially technical corrections. Exceptions 3 and 4 are clarifications of certain calculations advanced by the United States. Exceptions 5 through 7 object to "factual" findings which are in reality conclusions that certain undisputed circumstances are not "imperceptible" or "reasonably permanent." This type of conclusion does not rest on any resolution of credibility or other matter which the trier of fact is in a superior position to determine. Instead, these conclusions are essentially interpretations by the Master of the law of reliction, the correctness of which is now at issue for this Court's independent determination.

3. a. In discussing the speed and perceptibility of the movement of the waters along the shoreline of the Great Salt Lake, the United States has contended that (1) the average movement of the legal boundary of the Lake has been about 1½ inches per hour in the period since statehood; and (2) that the movement of that boundary in the flattest portion of the Lake shore, during the time of most extreme change in the Lake level, was about 15 inches per hour. At pages 60-66 of its brief, Utah questions the factual accuracy of these contentions.[1]

It is obvious that any averaging of the Lake's movement over a period of 75 years, over widely varying elevations and different topographical conditions,

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[1]We will not here argue further that the changes on a daily or seasonal basis, on which Utah in part relies (Utah Br. 38-43, 64 n. 2, paras. 1 and 2) do not change the legal boundary, any more than the movements from low to high tide, or the movements of a river during the seasonal periods of drought and flood.

would be only an estimate. Nevertheless, that estimate can be made with reasonable accuracy and does give a realistic view of the magnitude involved. For any given year the average rate of movement can be found by ascertaining (from Exh. P-5) the amount of land exposed or inundated by the change in the Lake level for the year, and then dividing by the shoreline at that elevation. In our example we simply took an average for each of these factors. Since, as noted in our brief (p. 4) and Exh. P-5, the amount of land affected by a given change is greater at the average elevation chosen (4198.5 feet) than either above or below that level, we probably overstate the rate of movement. Utah has chosen to attack the 350-mile average shoreline figure, though without supplying any figure of its own. Contrary to Utah's intimation (Utah Br. 62, n. 1), we are informed by the United States Geological Survey that it has never made an exact measurement of the shoreline of the Lake at any of the possibly relevant contour levels. We are also informed, however, that 350 miles is a reasonable estimate of the shoreline of the lake in the vicinity of its present level.

In any event, even if we concede *arguendo* that the shoreline is, for example, only 300 miles, the average rate of movement becomes only 1.9 inches per hour (see Br. p. 12 and n.7). That certainly does not alter the significance of the figure.

The figure of 15 inches per hour represents the most extreme movement of any part of the boundary during the year of most extreme change in the level of the Lake (Br. 12-13). In addition to its usual argument relying on daily and seasonal changes (Utah Br. 64, n. 2, paras. 1 and 2), Utah challenges the contention that this most extreme movement amounted to only 2.2 miles for the

year (*id.* at para. 3). Our calculations were made directly from Exhibit D-4, showing the actual contour of the Lake at its flattest point. We measured the distance affected by the change from 4196.83 to 4198.69 feet during the year with the greatest change in the Lake level. This is not inconsistent with Mr. Arnow's testimony at page 34 of the hearing transcript, that there are places along the Lake where at some Lake levels 5 feet difference in Lake level would mean "about 7½ miles" of distance along the shore. That testimony did not necessarily mean that a substantial Lake movement actually took place when the Lake was at the level Arnow was discussing.

Moreover, Utah's contention (Utah Br. 64, n. 2, para. 3), based on Mr. Arnow's testimony, that a rise of 1.86 feet at such a point would cause a movement of 2.79 miles at the shoreline, even if credited, would only change the figure for the most extreme movement in the most extreme year to 20 inches per hour (2.79 x 5280 x 12 divided by [365 x 24] = 20.18). This change would require only slight adjustments in the examples used on pages 20-21 of our brief to illustrate that such a movement is imperceptible. This rate of change would be equivalent to the movement of the minute hand on a 3 and 1/6 inch radius alarm clock; the movement of the second hand on a standard government wall clock would be 60 times more rapid than the Lake's movement; and the movement would still be slightly slower than that of the slowest known snail. We submit that even these figures do not constitute the type of rapid and perceptible movement necessary to defeat the application of the doctrine of reliction.

b. At page 70 of its brief Utah disputes our statement (Br. 18) that the land "being reinundated by the present rise in the Lake has been dry for the last 22 to 43 years." As of late May 1974, when the brief was written, the Lake was rising to just over 4201 feet. As shown by Exhibits P-9, P-11 and D-3, since 1931 the Lake has been above 4200 feet only for a brief period in 1952-1953, when it did not quite reach 4201 feet. Thus, depending on exactly where the Lake was on a given day, it was at a level which had not previously been reached in 22 to 43 years, exactly as stated. The significance of this fact is that although the Lake does fluctuate continuously, these minor fluctuations do not override long-term secular trends. Just as a river may gradually move by accretion in one direction and later return, despite momentary counter-movements, so here the Lake moves so that large areas are covered or exposed for years or decades at a time. That is all that is required by the law for a reliction to occur. See cases at Br. 18-20.

c. At pages 86-90, Utah raises certain objections to our discussion of the relation between the "surveyed meander line" and the level of the Lake at statehood. It should be noted that there is only one meander line. Different portions of it were surveyed at different times, beginning in 1855, and it is thus for convenience sometimes referred to as the line of 1855, although the date adds no specificity to the description. Utah contends that what it received at statehood should be measured by the meander line although it concedes that much of the meander line is above the Lake level at statehood (Utah Br. 62). The United States contends that under the Equal Footing doctrine, Utah's ownership at statehood must be measured by the water level at that time. Depending on the outcome here, this question may be resolved in a later stage of litigation.

In any event, the United States had no devious motive in the ellipsis to which Utah objects at pages 87-88.[2] Both parties recognized that by opposing the government's theory of reliction, Utah was denying the right that it would have under that theory to acquire land whenever the water level moved above the boundary of what Utah had received at statehood, whether that is measured by the meander line or by the statehood level.

Finally, Utah attacks our contention that the Master implicitly applied the doctrine of reliction in stating that "[t]he public benefit of Utah * * * has accompanied the reinundation of the bed of the Lake to approximately its extent at statehood" (Br. 23). We base this statement on two grounds. First, if reliction simply did not apply, and Utah's ownership had remained constant since statehood, why would its public benefit have changed at all? If it is to "accompany" the waters it must be because some incident of title also accompanies them. Second, the Master gives no indication that this "public benefit" will cease to "accompany" the waters if they rise above the statehood level (government's theory) or even the meander line (Utah's theory).[3] This could only be so if Utah's ownership were to continue to expand because of the rise of the Lake, and that could only be by means of the doctrine of reliction.

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[2]A comparison of the quotations at pages 87 and 88 shows that our ellipsis removed not simply the two words "of 1855," but the entire (and redundant) phrase, "or go beyond the meander line of 1855."

[3]We note that in some places the water has already risen above the meander line, because in a few places that line was surveyed when the Lake was below statehood level. See, *e.g.*, Section 8 of Township 6 North, Range 9 West on Exhibit D-2 (south and slightly west of Gunnison Island).

CONCLUSION

For the reasons stated herein and in our original brief, it is respectfully submitted that the United States should be confirmed as the owner, as of June 15, 1967, of such lands adjacent to United States property as had been exposed by the recession of the ordinary high water mark of the Great Salt Lake between the date of statehood, January 4, 1896, and June 15, 1967.

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